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In the
Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,
Petitioner,

v.

PATRICIA HEATON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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In the
SUPREME COURT OF THE UNITED STATES

MONOGRAM CREDIT CARD BANK OF GEORGIA,
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On Petition for Writ of Certiorari to the
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BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

Amici Curiae American Financial Services Association, American Bankers Association, and Consumer Bankers Association respectfully submit this brief in support of Petitioner Monogram Credit Card Bank[1]:

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[1] Pursuant to Supreme Court Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the AFSA, the ABA, and the CBA represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than AFSA, ABA, CBA, and their members made a monetary contribution to the preparation or submission of this brief. Petitioner's parent company, General Electric Capital Corporation,

INTEREST OF *AMICI CURIAE*

The American Financial Services Association ("AFSA") is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA's mission is "to assure a strong and healthy broad-based consumer lending services industry which is committed to: (1) providing the public with a quality and cost effective service, (2) promoting a financial system that enhances competitiveness, and (3) supporting the responsible delivery and use of credit-related products."

Organized in 1916, AFSA represents about 360 companies operating more than 10,000 offices engaged in extending $200 billion or about 15 to 20 percent of all consumer credit in the United States. AFSA's members include credit card issuers, independently-owned consumer finance companies, diversified financial services companies, and automobile finance companies. They provide a broad range of financial products and services to consumers throughout the United States, including credit card, checking account, and deposit account services, home mortgage loans, home equity loans, retail installment financing, automobile and mobile home financing, and lines of credit.

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and

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is an AFSA member, but it did not make a monetary contribution to the preparation or submission of this brief beyond ordinary payment of its yearly AFSA dues.

community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

The Consumer Bankers Association ("CBA") is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer finance (auto, home equity and education), electronic retail delivery systems, bank sales of investment products, small business services, and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters—including 85% of the nation's fifty largest bank holding companies—with assets totaling more than $2.9 trillion.

The AFSA, the ABA and the CBA frequently appear as *amici curiae* in cases raising issues of widespread importance and concern to banks and the consumer finance industry. They wish to appear in this case for two reasons.

First, the district court's underlying substantive ruling has ramifications of profound importance to AFSA, ABA, and CBA members across the country whose deposits are federally insured. The district court held that petitioner Monogram Credit Card Bank of Georgia was not a "state bank" under the Federal Deposit Insurance Act (12 U.S.C. § 1813(a)(2))—despite the FDIC's previous finding that it was. That ruling leaves institutions like Monogram (not to mention their customers) uncertain of whether their deposits remain federally insured, of the source and scope of the legal restraints on their activities, and, in some cases, of whether they are even entitled to continue their operations.

The Fifth Circuit's refusal to review the district court's order only compounded these problems. The issue has now

been remanded for re-determination by a state court, whose decision may or may not be adopted by other state courts, paving the way for inconsistent rulings on a uniquely federal question of law. The deposit institutions and the public need assurance that federal banking laws will be uniformly interpreted and applied *in a federal forum*, and that deposits, once found to be federally insured, will remain so.

Second, the question of the scope of appellate review of district courts' remand orders has perhaps a broader impact on the financial services industry than on any other. Most AFSA, ABA and CBA members are very heavily regulated by federal law. For that reason, they frequently seek removal to federal court, based on federal preemption, of lawsuits improperly commenced against them in state courts. They have a significant interest in obtaining a federal forum for resolution of the important federal questions most lawsuits against them (including this one) raise—as well as a uniform standard for appellate review of district courts' remand orders. The Fifth Circuit's overly narrow construction of 28 U.S.C. § 1447(d) curtails federal appellate review of important questions of federal law far more strictly than this Court's precedents warrant.

The AFSA, the ABA, and the CBA respectfully ask this Court to intervene and grant this petition.

REASONS FOR GRANTING THE PETITION

For the reasons stated in the Brief of Amicus Curiae Conference of State Bank Supervisors, the underlying remand order carries profound consequences for the banking industry. It threatens to destroy the competitive parity Congress meant to create between national banks and federally-insured state banks; it strips state banks of the procedural safeguards that

are supposed to protect against improper termination of their federally-insured status; it endangers Congress' carefully-crafted system of dual state and federal regulation of state banks. The AFSA, the ABA and the CBA join wholeheartedly in all points raised in the CSBS's amicus brief.

From the standpoint of the regulated banks, the district court's order creates uncertainty in crucial aspects of their operations.

The most serious question banks like Monogram must face in light of the district court's order is whether they retain their federally-insured status. Because being "engaged in the business of receiving deposits" is a threshold prerequisite to eligibility for federal deposit insurance, all federally-insured institutions—not just "state banks"—will face this question. *See* 12 U.S.C. § 1815(a)(1). Practically speaking, an institution will have to reassess not only whether it is "engaged in the business of receiving deposits," but also whether it continues to satisfy the other prerequisites to eligibility for federal deposit insurance.[2] After all, what the district court's order means is that, although the FDIC may have found long ago that a particular institution qualifies for federal deposit insurance, that prior finding can be collaterally challenged at any time, in any state or federal court, by any disgruntled bank customer.

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[2] *See, e.g.*, 12 U.S.C. § 1816 (listing factors the FDIC is to consider in determining whether to approve an institution's application for federal deposit insurance); FDIC Statement of Policy on Applications for Deposit Insurance, 63 Fed.Reg. 44752, 44756 (Aug. 20, 1998) (describing factors the FDIC considers in granting insurance).

In other words, because of the district court's order, neither the banks nor their customers can rely on the FDIC's deposit insurance determinations—even long-standing ones. The FDIC is no longer, apparently, the sole authority with power to decide whether an institution is "engaged in the business of receiving deposits." *See* 12 U.S.C. § 1818(p). Banks will no longer enjoy the procedural safeguards Congress included in the FDIA, designed to protect banks and their customers from sudden revocation of federal deposit insurance. *See id.*; 12 C.F.R. § 308.124. The district court's remand order strips away the procedural safeguards Congress intended to impart to banks, impacting both the banks and the public.

The district court's holding that Monogram is not a "state bank" for purposes of Section 27 of the FDIA will wreak particular havoc on banking operations. Under section 27, federally-insured state banks may charge interest as permitted by the laws of their home states, even on loans to out-of-state consumers. 12 U.S.C. § 1831d(a). In reliance on the FDIC's determination that they are "state banks" within the meaning of Section 27, state banks like Monogram have entered into a wide variety of credit transactions with consumers, using the imported interest rates of their home states.

The district court's ruling puts banks like Monogram in an untenable position. Many may decide to convert from state banks to national banks, to retain the interest rate protections allowed by Section 27.[3] Meanwhile, the banks may be subjected to a flood of usury lawsuits, as borrowers

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[3] *See* 12 U.S.C. § 85; *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (holding that national banks may charge interest as permitted by the laws of their home states).

from other states seek the often harsh penalties state usury laws impose. The banks may have to re-tool their interest rate provisions on a state-by-state basis, or stop doing business in certain states altogether, drastically limiting the availability of consumer credit to residents of states with particularly strict usury laws.

The district court's ruling raises a host of other questions for state banks like Monogram, most of which are unanswerable without more litigation. If they are no longer "state banks" for purposes of section 27, do their deposits remain federally insured? Does the rest of the FDIA still govern their activities? If not, what laws do? Must they comply with inconsistent state laws or face the wrath of the state banking agencies? Are there gaps in state regulations that the federal ones no longer fill? Is the bank even entitled to continue operating under its state charter?[4]

These questions will likely be answered through case-by-case adjudication in the courts of the several states, which may or may not be inclined to develop a uniform body of answers. If the Fifth Circuit's ruling is allowed to stand, the issues will not be reviewable in a federal forum. Banks like Monogram will have even greater incentives to convert from state bank to national bank charters, or, at a minimum, will tend to gravitate toward those states whose courts have rendered favorable rulings on these questions.

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[4] "[T]he depository institution is often required by its chartering authority to obtain federal deposit insurance as a condition to conducting business. *See, e.g.*, Fla. Stat. 658.995(3); Va. Code 6.1-392.1.A.4." FDIC Notice of Proposed Rulemaking: "Being Engaged in the Business of Receiving Deposits Other Than Trust Funds," 66 Fed. Reg. 20, 201 (2001).

In short, the district court's remand order, and the Fifth Circuit's refusal to review it, creates monumental problems for our country's banking system. Banks like Monogram must be able to rely on the FDIC's determination that they are "engaged in the business of receiving deposits" within the meaning of the FDIA, and that their status as federally-insured depository institutions will not be stripped away unless and until the FDIA's carefully-devised procedures are followed. Both the banks and the public need to know that federal banking laws will be applied consistently, and that, once insured, their deposits will remain so.

The importance of these issues to the national banking system warrants this Court's intervention and review.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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